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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CHARLES ROBERT JOSEPH, Defendant and Appellant.	C058278 (Super. Ct. No. 07F06268)

A jury convicted defendant Charles Robert Joseph of robbery (Pen. Code, § 211) and assault with a firearm (Pen. Code, § 245, subd. (a)(2)) and found true enhancements for personal use of a firearm. (Pen. Code, §§ 12022.5, subd. (a)(1), 12022.53, subd. (b).) Defendant was sentenced to state prison for the midterm of three years for the robbery plus 10 years for the firearm use. The same sentence was imposed for the assault and the related firearm use, but stayed pursuant to Penal Code section 654.

On appeal, defendant contends (1) the court committed prejudicial error when it denied his *Batson/Wheeler* motion,[1] and (2) he was denied due process because of prejudicial misconduct by the prosecutor. We reject both contentions.

FACTS

Bobby Dhillon testified that on June 26, 2007, at approximately 2:00 a.m., he was working as the clerk in a 7-11 convenience store when defendant entered the store with a T-shirt covering his face as a mask. Dhillon spoke with the man for a few seconds and then the mask came "undone" and fell, revealing the man's face. Dhillon identified the person as defendant. Defendant pulled the mask back up and then lifted the shirt he was wearing over his torso, displaying a gun in his waistband. After forcing Dhillon to lie down behind the counter, defendant took over $200 from the cash register and left. Dhillon immediately called the police.

The officers who were responding to Dhillon's call were redirected to the home of James Jefferson, about two blocks from the 7-11 store. There the officers found defendant being detained by Jefferson, who had found defendant sitting in Jefferson's car. Defendant had $232 in his pocket and a search of Jefferson's car disclosed a .22 caliber handgun.

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[1] Referring to *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69] (*Batson*), and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

Defendant did not testify, but argued the evidence was insufficient to establish defendant's identity as the robber.

DISCUSSION

I

Defendant's contention that the court erred in denying his *Wheeler/Batson* motion arises as follows. A.M. was one of two African-Americans in the jury pool. During voir dire A.M. stated that for the past three months he was employed as a program technician for the State Controller's Office researching and analyzing requests by individuals for funds. He had previously worked as a delivery supervisor at Diakon Logistics for two and one-half years. For about six months, he worked as a co-counselor for a group home for troubled youths 14 to 18 years of age, helping "them to get back to work to become better people and stop them in their behavior." He was also a clergyman and had been preaching for eight years. He believed that all people "deserve[d] to be treated fairly" and that his religious teachings regarding being merciful and compassionate would not interfere with his ability to determine the facts of a case. He had served as a juror on a prior case, which he said was civil and in federal court. However, he described the case as convicting a person who had brought "stuff" into the prison, and he said that the case had been tried in the same courthouse that the instant case was being tried.

The People excused A.M. by exercising a peremptory challenge and defendant objected pursuant to *Wheeler* and *Batson*. Later, the parties and the court placed on the record an in-

chambers discussion regarding defendant's *Wheeler/Batson* motion. Defense counsel stated that he was bringing the motion because he could not see anything from what A.M. had said that would render him from being a fair juror. The court responded that counsel had failed to establish a prima facie case of discrimination, and that it was apparent to the court that based on A.M.'s responses there were "nonracial" grounds for the prosecutor's exercise of a peremptory challenge, and asked the prosecutor whether she wished to comment, noting that she need not do so.

The prosecutor stated: "My concern was . . . his previous occupation as a social worker. He said he had worked in a level 12 group home, working with youth who had committed crimes, trying to give them another chance. [¶] As our defendant is young in this case, I believe that could be potentially a bias for him. Also, he said he is a preacher and does not like to judge other people." The court responded that what the prosecutor had said "was apparent to me," and was a valid basis for exercising the challenge.

Defendant essentially repeats the argument he made in the trial court, namely, he reiterates A.M.'s above-cited record along with A.M.'s claims that neither A.M.'s religion nor any other reason apparent from the record would preclude A.M. from being a fair juror, and from this defendant concludes that the only explanation for the prosecutor's excusing A.M. had to be his race or ethnicity. Defendant is wrong.

A three-step procedure is involved when a defendant objects at trial that the prosecution has exercised a peremptory challenge in a discriminatory manner. "'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citation.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]'" (*People v. Johnson* (2006) 38 Cal.4th 1096, 1099.)

Here, we agree with the trial court that defendant failed to establish a prima facie case of discrimination. Certainly, A.M. may be a well-qualified juror. But that is not the point. The question is whether his responses left open a reasonable inference that because of his work with troubled youths his determination of the facts could be skewed in favor of another troubled youth, namely, defendant. And that answer is yes--A.M.'s good heartedness could have led him to want to see defendant get another chance. Additionally, A.M. seemed easily confused as shown by his description of the case and location of his prior service as a juror. He stated the case was civil, but his description left no doubt that the case was criminal. He claimed the trial was in federal court, which he said was the

same courthouse he was presently in. But in fact he was presently in the building housing the Sacramento County Superior Court, a building separate from the federal courthouse. Because the foregoing constitute race-neutral explanations for the prosecutor's exercise of her peremptory challenge, defendant failed to establish a prima facie case of discrimination.

II

Defendant contends the prosecutor committed prejudicial misconduct when, during argument, she referred to two dismissed charges. The issue has not been preserved for appeal.

In addition to the present charges of robbery and felony assault, defendant was initially charged with receiving stolen property (count 3), carrying a concealed firearm (count 4), and carrying a loaded firearm (count 5). These charges were read to the jury prior to the presentation of evidence. At the conclusion of the prosecutor's case-in-chief, she moved for dismissal of counts 4 and 5. The court granted the motion and instructed the jury that "you are not to speculate or consider in any way why those charges do not need to be decided."

In reading the instructions to the jury, the court read the language relating to the dismissed counts. The court caught its error and immediately instructed the jury that, "I forgot to take out the language regarding Counts 4 and 5 so disregard that, please."

During the prosecutor's argument, she cited to the evidence relating to the robbery and then said, "There are other charges in this case, two of them the possession of -- carrying a loaded

firearm in public. We are not going to bother with that." Then, without objection, the prosecutor completed her opening argument and the jury was temporarily recessed. The court asked whether there was "[a]nything for the record" and the following exchange occurred:

"[DEFENSE COUNSEL]: One thing. I didn't mean to interrupt counsel. At the very end I think she misspoke. She said I am not going to bother with talking about 4 and 5.

"THE COURT: Yes, I heard that.

"[DEFENSE COUNSEL]: You probably didn't mean to say that.

"THE COURT: There is no 4 and 5. You said there are other charges. I am not going to bother with Counts 4 and 5. They have been dismissed. Technically, there are no other charges.

"[DEFENSE COUNSEL]: I wanted to note that.

"THE COURT: Anything else?

"[DEFENSE COUNSEL]: No."

Defendant contends that the prosecutor's reference to "other charges" was misconduct because it constituted argument based on evidence outside the record and that the above-cited colloquy between he and the court was adequate to preserve the issue for appellate review.

"To preserve a claim of prosecutorial misconduct during argument, a defendant must contemporaneously object and seek a jury admonition." (*People v. Bonilla* (2007) 41 Cal.4th 313, 336.) Even assuming the dubious propositions that the prosecutor's inadvertent reference to counts 4 and 5 constituted misconduct, a circumstance which she immediately corrected by

pointing out that the jury need not be bothered with those counts, and that defendant's observation regarding the prosecutor's having "misspoke[n]" constituted an objection, the objection was neither timely nor did it satisfy the requirement that he seek an admonition. The purported objection was not contemporaneous with the alleged misconduct, hence it was untimely; and a request for an admonition would clearly have reminded the jury, if they so needed such reminding, that counts 4 and 5 had nothing to do with the charges against defendant. Given these failings, the issue has not been preserved for appellate review.

The recent amendments to Penal Code section 4019 do not operate to modify defendant's entitlement to credit, as he was convicted of serious felonies. (Pen. Code, § 4019, subds. (b), (c); Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.)

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

BUTZ, J.